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COURT OF APPEALS
DIVISION II

NO. 41633-6-II

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COURT OF APPEALS, DIVISION II STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

vs.

ASLAN M. JEFFREY,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 10-1-00120-4

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence.
2. The trial court erred in allowing the State to ask Officer Moran a question that resulted in an unconstitutional comment on Jeffrey's right to remain silent.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Jeffrey's conviction for attempting to elude a pursuing police vehicle? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing the State to ask Officer Moran a question that resulted in an unconstitutional comment on Jeffrey's right to remain silent? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Aslan M. Jeffrey (Jeffrey) was charged by information filed in Mason County Superior Court with one count of attempting to elude a pursuing police vehicle. [CP 34-35].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Jeffrey was tried by a jury, the Honorable Toni A. Sheldon presiding. Jeffrey had no objections and took no exceptions to the Court's Instructions to the Jury. [CP 20-33; RP 82-87]. The jury found Jeffrey guilty as charged of attempting to elude a pursuing police vehicle. [CP 16; RP 118-119].

The court sentenced Jeffrey to a standard range sentence of 5-months based on an undisputed offender score of 3. [CP 6-15; RP 120-124].

Timely notice of appeal was filed on December 20, 2010. [CP 5]. This appeal follows.

2. Facts

On April 4, 2010, at approximately 8 AM, Shelton Police Officer Mike Fiola (Fiola) noticed a three wheel ATV in the parking lot of the City Center Motel in the parking stall associated with room of the motel. [RP 40-42]. Fiola decided to investigate to determine whether the ATV was stolen. [RP 42]. While Fiola was looking for a VIN number on the ATV, Jeffrey, who Fiola knew from prior contacts, came up behind Fiola and Fiola asked him whether the ATV belonged to Jeffrey. [RP 42-43]. Jeffrey denied owning the ATV and went into room 3 of the motel. [RP 42-43]. Fiola couldn't find a VIN/serial number and left to respond to other incoming calls. [RP 43].

Later that morning, at approximately 11 AM, Fiola went to assist Shelton Police Officer Calvin Moran (Moran), who was pursuing with lights and siren a three wheel ATV that was refusing to stop. [RP 43-44, 62-63]. Fiola positioned his police vehicle across a street to block the ATV from passing. [RP 44, 63]. Fiola saw the three wheel ATV he had

seen earlier that morning approach at approximately 20-30 miles per hour, and identified the driver as Jeffrey because he “could clearly see Mr. Jeffrey’s eyes and nose,” but the ATV driver was wearing a helmet that covered all but the driver’s eyes and nose. [RP 44-45, 52]. Fiola attempted a felony stop by pointing his pistol at the ATV driver and ordered him to stop. [RP 45]. The ATV drove up onto the sidewalk around Fiola’s police vehicle and drove off with Fiola and Moran both pursuing it. [RP 45, 51, 63-64, 68-69]. The ATV drove past a stop sign without stopping into an intersection then onto a dirt road at which time Fiola and Moran discontinued the pursuit only to come upon the ATV when it was again sighted on the road crossing lanes of traffic causing other vehicles to serve out its way driving directly at the officers. [RP 46-47, 51, 64-65, 68-69]. At this time, Mason County Sheriff Deputy Danielle Rickards (Rickards) also joined the pursuit. [RP 49-50, 56-58, 65]. The ATV eventually drove off road and disappeared. [RP 49-50, 56-58 65-66]. Neither officers Fiola and Moran, nor deputy Rickards had any contact with the driver of the ATV. [RP 50, 58, 65].

David Jeffrey, Jeffrey’s younger brother, testified that on April 4, 2010, between 9AM and 1 PM, he and Jeffrey were at his mother-in-law’s house working on her addition—she was paying Jeffrey to install the insulation. [RP 71-73]. David Jeffrey specifically recalled working that

day because it was Easter Sunday and he was “kind of bummed that [he] had to work on Easter but it needed to be done.” [RP 72]. The State asked David Jeffrey on cross-examination whether he had ridden an ATV on the day he worked on his mother-in-law’s home with David Jeffrey denying doing so. [RP 74].

Jeffrey did not testify.

On rebuttal, the State recalled Moran who testified that on April 21, 2010, he contacted Jeffrey at the Mason County Jail, that Jeffrey refused to speak with him, but as he was leaving the jail that Jeffrey spontaneously denied driving the ATV that it was his brother. [RP 80].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JEFFREY WAS GUILTY OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P. 2d (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Jeffrey was charged and convicted of violation of attempting to elude a pursuing police vehicle. [CP 16, 34-35]. As instructed by the court in Instruction No. 10, [CP 31; RP 94-95], the essential elements of this crime are as follows:

- 1) That on or about the 4th day of April, 2010, the defendant drove a motor vehicle
- 2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- 3) That the signaling police officer’s vehicle was equipped with lights and siren;
- 4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- 5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- 6) That the acts occurred in the State of Washington.

In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that it was in fact Jeffrey who was driving the three wheel ATV. This is a burden the State cannot sustain.

The sum of the evidence in support of the State's burden on this essential element consists solely of the testimony of Officer Fiola— Officer Moran and Deputy Rickards did not identify the driver of the ATV as Jeffrey. Fiola testified that he had seen the three wheel ATV parked in a motel parking lot in parking space for room 3 at 8 AM on April 4, 2010; that he saw Jeffrey in the motel parking lot and asked him if the ATV was his; that he knows Jeffrey from prior contacts; that Jeffrey denied owning the ATV; that Jeffrey entered room 3; that later that morning (approximately 11 AM) he again saw the ATV trying to elude three pursuing police vehicles (including his own); and that Jeffrey was the driver of the ATV because he saw Jeffrey's eyes and nose.

However, this evidence does not establish beyond a reasonable doubt the essential element that it was in fact Jeffrey driving the ATV given the fact that the entire incident happened in less than two minutes much of which involved a chase, and the driver of the ATV was wearing a helmet that only exposed his eyes and nose. There was no evidence presented as to who owned the ATV. More importantly, David Jeffrey testified that he and Jeffrey, his older brother, were at his mother-in-law's

house working on her addition between 9 AM and 1 PM.¹ Given this evidence and the fact that the only evidence supporting Jeffrey's identity as the driver of the ATV was testimony of Fiola who only saw the driver's eyes and nose and could have been mistaken, it cannot be said that the State established beyond a reasonable doubt that Jeffrey was in fact the driver of the ATV, an essential element of the crime for which he was convicted. This court should reverse and dismiss Jeffrey's conviction for attempting to elude a pursuing police vehicle.

(2) OFFICER MORAN IMPROPERLY COMMENTED ON JEFFREY'S CONSTITUTIONAL RIGHT TO REMAIN SILENT WHEN CALLED AS A WITNESS FOR AND QUESTIONED BY THE STATE.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. at 479.² "The purpose of the right is ... 'to spare the accused from having to

¹ The State is likely to argue that David Jeffrey's testimony is questionable given that Officer Moran testified on rebuttal that Jeffrey stated that he wasn't driving the ATV rather it was his brother. [RP 80]. However, David Jeffrey's testimony and Jeffrey's comment could both be true as there is nothing in the record to indicate that Jeffrey has only one brother, David. Since the State bears the burden of proof beyond a reasonable doubt, absent resolution to this question, it is a burden the State cannot sustain.

² "[T]he protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment." State v. Earls, 116 Wn.2d 364, 374-375, 805 P.2d 211 (1991) (citing State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971)). Article 1, section 9 provides:

No person shall be compelled in any criminal case to give evidence against himself....

The Fifth Amendment provides:

reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.””
State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (*quoting Doe v. United States*, 487 U.S. 201, 213, 108 S.Ct. 2341, 1010 L.Ed.2d 184 (1988)). A defendant’s constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243. Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Q: Who arrested Mr. Douglas?
A: I did.
Q: Did he make any statements to you?
A: No.

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) (*quoting Douglas v. Cupp*, 578 F.2d at 267).

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. State v. Easter, 130 Wn.2d at

...nor shall [any person] be compelled in any criminal case to be a witness against himself....

241. Likewise, it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. at 13. Jeffrey can raise this issue, which is manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (*citing* State v. Curtis, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3)).

The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d at 242.

In this case, the State was allowed to elicit on rebuttal the following impermissible testimony from Officer Moran commenting on Jeffrey's right to remain silent:

Q: Did you ever have contact with the defendant in this case?

A: Yes, I did.

Q: And do you remember what day that took place?

A: That was on April 21st, in the a.m., around 7:00 a.m..

Q: And where did that contact take place?

A: At the Mason County Jail.

Q: And did you ask the defendant if he wanted to talk to you about this elude incident?

A: Yes I did.

Q: And did he want to talk to you about it?

A: No he didn't.

[Emphasis added]. [RP 79-80].

As previously indicated, in Easter, our Supreme Court held it is a violation of a defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her. State v. Easter, 130 Wn.2d at 241. (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer). Thus, a direct comment on the right to remain silent is a constitutional error requiring a constitutional harmless error analysis, State v. Easter, 130 Wn.2d at 241. A constitutional harmless error means the error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).

In the instant case, the State's question and Officer Moran's answer constitutes error of constitutional proportions and is not harmless. The direct implication of officer's testimony is that Jeffery was guilty by refusing to speak with Moran, which appears more egregious than the silence followed by looking away in Easter.

There was no probative value in officer's response. The only value was the inference that only a person who had something to hide or was guilty would remain silent. The question and answer served no purpose other than to imply that Jeffrey refusing to speak with the officer "was more consistent with guilt than with innocence." See State v. Curtis, 110 Wn. App. at 14.

The State's evidence against Jeffrey regarding the crime at issue was not overwhelming as argued in the preceding section of this brief. Any improper inference based on Jeffrey's exercise of his right to remain silent that could be construed as bolstering the weak evidence on his identity as the perpetrator of the crime charged is prejudicial, and it cannot be said this error was harmless beyond a reasonable doubt. See State v. Easter, 130 Wn.2d at 242-243. This court should reverse Jeffrey's conviction for attempting to elude a pursuing police vehicle.

E. CONCLUSION

Based on the above, Jeffrey respectfully requests this court to reverse and dismiss his conviction.

DATED this 2nd day of August 2011.

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CERTIFICATE OF SERVICE

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Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of August 2011, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 2nd day of August 2011.

Patricia A. Pethick
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